Office - Supreme Court, U.S.
FILED
JUN 29 1982
ALEXANDER L. STEVAS,
CLERK

81-2392

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PHILLIPS PETROLEUM COMPANY,

Petitioner,

v.

EDDIE C. SAUCEDO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ANDREW S. HANEN*
FRED KNAPP, JR.
ALFRED H. EBERT, JR.

ANDREWS & KURTH
4200 Texas Commerce Tower
Houston, Texas 77002
(713) 220-4200

EUGENE C. MARSHALL

PHILLIPS PETROLEUM COMPANY
Houston, Texas

KENNETH HEADY
C. J. ROBERTS

PHILLIPS PETROLEUM COMPANY
Bartlesville, Oklahoma

Attorneys for Petitioner, Phillips Petroleum Company

* *Counsel of Record*

Bourne of Houston, Inc. Printed in U.S.A.

QUESTIONS PRESENTED*

1. Whether the Court of Appeals erred by not following the only applicable decisions of the courts of the State of Texas in violation of *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 34 (1938) and 28 U.S.C. § 1652?

2. Whether the Court of Appeals erred by overruling prior decisions of its own circuit, thereby creating a conflict within the Fifth Circuit, with regard to the applicable questions of Texas law?

3. Whether the holding of the Court of Appeals in combination with the corporate laws of the State of Texas, Tex. Bus. Corp. Act Ann. art. 2.01, violates the due process clause of the Fifth and the Fourteenth Amendments as well as the Commerce Clause of the Constitution of the United States of America (Art. 1, § 8, Cl. 3) because, under this holding, petitioner is liable for injuries surrounding the repair of a pipe line which the State of Texas prohibits petitioner from owning or controlling?

---

* In compliance with this Court's Rule 28.1, a list of corporations in which Phillips Petroleum Company holds less than a 100% interest follows: Acurex Corporation; Aero Oil Company; Alyeska Pipeline Service Company; Arctic LNG Transportation Company; Bonny LNG Limited; Bruin Carbon Dioxide Sales Corporation; Calatrava Empress Para Ia Industria, Petroquimica, S.A.; Canada Western Cordage Co., Ltd.; Canyon Reef Carriers Inc.; Chisholm Pipeline Company; Cochin Refineries Ltd.; Colonial Pipeline Company; Compagnie Francaise du Carbon Black S.A.; Dixie Pipeline Company; Drisco S.A. de C.V.; Everglades Pipeline Company; Explorer Pipeline Company; Insurance and Reinsurance Brokers, Ltd.; Iranian Marine International Oil Company; Kaw Pipe Line Company; Kensi LNG Corporation; LeeFac, Inc.; Negromex S.A.; Newmont Mining Corporation; Nordisk Philblack AB; Norland GmbH; Norpipe A/S; Norpipe Petroleum U.K. Ltd.; Norsea Gas A/S; Norsea Gas GmbH; Norsea Pipeline Ltd.; Papago Chemicals, Inc.; Petrochim; Phillips Carbon Black Limited; Phillips Carbon Black Company (Pty.) Ltd.; Phillips Carbon Black Italiana S.p.A.; Phillips Gas Supply Corporation; Phillips Imperial Petroleum Limited; Phillips Pacific Chemical Company; Phillips Petroleum Singapore Chemicals

4. Whether the Court of Appeals deprived petitioner of due process by refusing to consider or address the main point of law of petitioner's appeal?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below were Plaintiff-Appellee, Eddie C. Saucedo, Respondent herein, and Defendant-Appellant, Phillips Petroleum Company, Petitioner herein. Texas Employers Insurance Association, the workers compensation carrier for Saucedo's employer, was allowed to intervene in the district court proceedings. Its interests are the same as those of Respondent, Eddie C. Saucedo, and it has allowed the counsel for Saucedo to represent its interests at all stages of the appellate process.

(Private) Limited; Philmac Oils Limited; Plasticos Vanguardis S.A.; Polar LNG Shipping Corporation; Polyolefins; Quimica Veneco C.A.(b); Renolit Fertighaus GmbH; Salk Institute Biotechnology Industrial Assoc. Inc.; Seadock, Inc.; Seaway Pipeline Inc.; Sevalco (Holdings) Limited; SPODCO Ltd.; Venezoil, C.A.; Texas Offshore Port, Inc.; Transatlantic Reinsurance; Western Desert Operating Petroleum Company; White River Shale Oil Corporation.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS BELOW	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES	2
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	8
I. The decisions below conflict with two different rules of Texas law, either of which completely exculpates Phillips. The decisions below ignore the dictates of *Erie Railroad Co. v. Tompkins, supra,* and 28 U.S.C. § 1652	8
II. The decision below also conflicts with prior decisions of the Fifth Circuit which have followed the laws of Texas. Accordingly this decision has created an intracircuit conflict as well as a conflict with the explicit law of the State of Texas	13
III. The decision rendered by the Fifth Circuit in the instant case violates the rights granted to Phillips under Article 1, Section 8 ("Commerce Clause") and the Fifth and Fourteenth Amendments to the Constitution of the United States	15
IV. The Fifth Circuit erred by not considering certain points on appeal which are dispositive of this case. Phillips has a statutory right to have an appeal and the Fifth Circuit violated Phillips' rights to due process guaranteed by the Fifth and Fourteenth Amendments to the Constitution by failing to consider all points which would control the outcome of the case	20
CONCLUSION	22

PAGE

Appendix

A – Opinion of the United States Court of Appeals for the Fifth Circuit A-1

B – Judgment of the United States Court of Appeals for the Fifth Circuit B-1

C – Opinion and Judgment of the United States District Court for the Western District of Texas C-1

D – Denial of Petiton for Rehearing and Suggestion for Rehearing En Banc D-1

E – Text of Texas Revised Civil Statute Annotated Article 8303, Section 3 ..... E-1

TABLE OF AUTHORITIES

PAGE

CASES

Alexander v. *United States*, 605 F.2d 828 (5th Cir. 1979) 8, 13, 14, 15, 16

Biddy v. *Diamond*, 516 F.2d 118 (5th Cir. 1975) 21

Boddie v. *Connecticut*, 401 U.S. 371 (1971) 21

City of Beaumont v. *Graham*, 441 S.W.2d 829 (Tex. 1969) 9, 12, 20

City of Bishop v. *South Texas Elec. Co-op, Inc.*, 577 S.W.2d 331 (Tex.Civ.App. – Corpus Christi 1979, no writ) 10

Commissioner v. *Bosch*, 387 U.S. 456 (1967) 11

Dickinson v. *Petroleum Conversion Corp.*, 338 U.S. 507 (1950) 13

Empire Life Insurance Co. of America v. *Valcek Corp.*, 468 F.2d 330 (5th Cir. 1972) 21

Erie Railroad Co. v. *Tompkins*, 304 U.S. 34 (1938) ... 8, 12, 18

Fidelity Union Trust Co. v. *Field*, 311 U.S. 169 (1940) 11

Fulford v. *Klein*, 529 F.2d 377 (5th Cir. 1976) 13

Groendyke Transport, Inc. v. *Davis*, 406 F.2d 1158 (5th Cir.), *cert. denied*, 394 U.S. 1012 (1969) 21

Grosjean v. *American Press Co.*, 297 U.S. 233 (1936) 17

Hodel v. *Virginia Surface Mining & Reclamation Ass'n.*, ... U.S. ...., 101 S. Ct. 2352 (1981) 18

John Hancock Mut. Life Ins. Co. v. *Bartels*, 308 U.S. 180 (1939) 13

Kassel v. *Consolidated Freight Ways Corp. of Del.*, ... U.S. ...., 101 S. Ct. 1309 (1981) 18

Scurlock Oil Company v. *Birchfield*, 630 S.W.2d 674 (Tex. Civ.App. – Houston [1st Dist] 1981, no writ) 9, 10, 11, 19

Welch v. *Heat Research Corp.*, 644 F.2d 487 (5th Cir. 1982) 8, 13, 15, 16

West v. *A.T. & T. Co.*, 311 U.S. 223 (1940) 11

PAGE

UNITED STATES CONSTITUTION

U.S. CONST. art I, § 8, cl.13 ..... 2, 15,18
U.S. CONST. amend. V. 2, 20, 21
U.S. CONST. amend XIV. 2, 20, 21

STATUTES & RULES

28 U.S.C. § 1254(1) 2
28 U.S.C. §1292 20
28 U.S.C. §1652 ..... 3, 8, 11, 12
49 U.S.C. §1 *et seq.* 16, 19
49 U.S.C. §2001 (Supp. 1982) 19
S. Ct. R. 17.1(a) 2
Fed. R. App. P. 3 20
Fed. R. App. P. 4 20
Fed. R. App. P. 35 13
Tex. Rev. Civ. Stat. Ann. art. 8306, §3 (Vernon 1967) 5
Tex. Bus. Corp. Act Ann. art. 2.01B(3)(b) (1981) .. 3, 7, 16, 17

TREATISES

31 A.L.R. 2d 1375 (1953) 20
Kastenmeier and Remington, *Court Reform and Access to Justice: A Legislative Perspective*, Harv. J. On Legis. Vol. 16:2, 301 (1979) 12

No. .....

In The

Supreme Court of the Unite States

October Term, 1981

Phillips Petroleum Company,

Petitioner,

v.

Eddie C. Saucedo,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Phillips Petroleum Company prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this action.

OPINIONS BELOW

1. The Court of Appeals opinion is reported at 670 F.2d 634 (5th Cir. 1982) and is annexed hereto as Appendix A.

2. The opinion of the United States District Court for the Western District of Texas is unreported and with the judgment is annexed hereto as Appendix C.

JURISDICTION

The judgment of the Fifth Circuit was made and entered on March 19, 1982, and a copy thereof is annexed hereto as Appendix B. Petitioner timely filed a Petition for Rehearing and a Suggestion for Rehearing En Banc, which were denied on May 19, 1982. (See Appendix D.) This petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rule 17.1(a) of the Rules of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES

1. Article 1, § 8, Cl. 3 (the Commerce Clause) of the United States Constitution provides:

> The Congress shall have Power... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;...

2. The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. The Fourteenth Amendment, Section 1, to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. 28 U.S.C. § 1652 provides:

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

5. Texas Business Corporation Act Article 2.01 provides:

A. Except as hereinafter in this Article excluded herefrom, corporations for profit may be organized under this Act for any lawful purpose or purposes. Corporations for the purpose of operating non-profit institutions, including but not limited to those devoted to charitable, benevolent, religious, patriotic, civic, cultural, missionary, educational, scientific, social, fraternal, athletic, or aesthetic purposes, may not adopt or be organized under this Act.

B. No corporation may adopt this Act or be organized under this Act or obtain authority to transact business in this State under this Act:

(1) If any one or more of its purposes for the transaction of business in this State is expressly prohibited by any law of this State.

(2) If any one or more of its purposes for the transaction of business in this State is to engage in any activity which cannot lawfully be engaged in without first obtaining a license under the authority of the laws of this State to engage in such activity and such a license cannot lawfully be granted to a corporation.

(3) If among its purposes for the transaction of business in this State, there is included, however worded, a combination of the two businesses listed in either of the following:

(a) The business of raising cattle and owning land therefor, and the business of operating stockyards and of slaughtering, refrigerating, canning, curing or packing meat. Owning and operating feed lots and feeding cattle shall not be considered as engaging in "the business of raising cattle and owning land therefor" within the purview of this paragraph of this subsection.

(b) The business of engaging in the petroleum oil producing business in this State and the business of engaging directly in the oil pipe line business in this State: provided, however, that a corporation engaged in the oil producing business in this State which owns or operates private pipe lines in and about its refineries, fields or stations or which owns stock of corporations engaged in the oil pipe line business shall not be deemed to be engaging directly in the oil pipe line business in this State; and provided that any corporation, or group of corporations acting in partnership or other combination with other corporations, engaged as a common carrier in the pipe line business for transporting oil, oil products, gas, carbon dioxide, salt brine, fuller's earth, sand, clay, liquefied minerals or other mineral solutions, shall have all of the rights and powers conferred by Sections 111.019 through 111.022, Natural Resources Code.

(4) If any one or more of its purposes is to operate any of the following:

(a) Banks, (b) trust companies, (c) building and loan associations or companies, (d) insurance companies of every type and character that operate under the insurance laws of this State, and

corporate attorneys in fact for reciprocal or inter-insurance exchanges, (e) railroad companies, (f) cemetery companies, (g) cooperatives or limited cooperative associations, (h) labor unions, (i) abstract and title insurance companies whose purposes are provided for and whose powers are prescribed by Chapter 9 of the Insurance Code of this State.

6. The text of Texas Revised Civil Statute Annotated article 8306, sec. 3 is reproduced in Appendix E.

STATEMENT OF THE CASE

This action was brought by Eddie C. Saucedo ("Saucedo") against Phillips Petroleum Company ("Phillips"), for injuries which resulted from a pipe line flash fire. At the time of the accident, Saucedo was employed as a pipe line repairman solely by Phillips Pipe Line Company ("Pipe Line Company"), the owner and operator of the pipe line. The Pipe Line Company, however, was not a defendant below. Instead Saucedo brought the action against Phillips, the parent of the Pipe Line Company, in attempt to circumvent the effect of the Texas Workers Compensation Act. Tex.Rev.Civ.Stat.Ann. art. 8306, Sec. 3. Jurisdiction of the district court was invoked pursuant to 28 U.S.C. § 1332.

A review of the facts surrounding the accident in this case are necessary to enable the Court to review the opinion below.

On October 18, 1974, the date of the flash fire, Saucedo was employed by the Pipe Line Company as a welder's helper in its maintenance department, specifically as part of a crew fixing leaks in its pipe line (S.F. 34-41). Late in the workday on October 17, 1974, Saucedo and other members of the crew were notified that a leak had occurred

about 15-20 miles outside of Eldorado, Texas (S.F. 40). When the crew arrived that evening they set up watch to protect passersby until daylight the next morning when they could begin repairs (S.F.42).

The crew, however, did not turn off the flow of the natural gas liquids ("NGLs") (S.F. 326). Instead, they let it continue to flow all night and all morning right up to the time of the flash fire (S.F. 112). This continuous flow created heavy vapors and puddles of NGLs, which, even Saucedo testified, created unsafe working conditions (S.F. 46, 106, 347).

On the morning of October 18th, some twelve hours after the crew's arrival, the crew began repair work. [Both parties agree on the length of time that passed between the time the crew arrived on the situs of the leak and the time the repair started and the time the flash fire occurred. The Fifth Circuit, however, in order to justify its conclusion concerning proximate cause mistakenly and without any justification wrote that these events occurred simultaneously (App. A, p. A-5).] A backhoe was used to uncover the pipe line (S.F. 43), but the backhoe could not remove the dirt from underneath the pipe (S.F. 101-102). The crew then decided to use a jackhammer to break loose the dirt (S.F. 46-47). While Saucedo was standing in puddles of NGLs (S.F. 103-104) taking his turn at the jackhammer, the gas ignited for some unexplained reason and Saucedo was injured (S.F. 52). The exact cause of the flash fire has never been determined, but the district court found that the Pipe Line Company was negligent in three different aspects of the repair process (App. C, p. C-6).

All witnesses agreed that at all times during this entire operation *only Pipe Line Company employees were at the scene* (S.F. 47-49). The Pipe Line Company had *no procedure to report leaks to Phillips, and indeed did not report*

leaks to Phillips. The Pipe Line Company was in total charge of the repair process and in total control of the premises (S.F. 735-36). In this case Phillips did not learn of the leak until after the accident (S.F. 280-82). Saucedo testified that he at all times relied upon his supervisor, a Pipe Line Company employee, to tell him the safe way to fix the leak (S.F. 55). Phillips exercised no control over the pipe line or its repair, nor could it exercise control because of certain explicit provisions of Texas law. Tex.Bus.Corp. Act Ann. art. 2.01B(3)(b) (1981) states no corporation may engage in both the business of producing petroleum products *and* the petroleum pipeline business.

Trial was held before the United States District Court for the Western District of Texas, sitting without a jury, and judgment in the amount of $714,393.43 was rendered in Saucedo's favor. The district court found Phillips negligent for allowing its product to be transported through the pipe line and in its management of the pipe line's cathodic protection system (a system designed to retard corrosion in the pipe line). The Pipe Line Company, which alone controlled the means and methods of repair, was found negligent for (1) its failure to shut off the gas during repair, (2) its failure to remove gas vapors from the repair area, and (3) its failure to provide its work crew (including Saucedo) with protective equipment. At the same time, however, the district court expressly held that Phillips was not vicariously liable to Saucedo for the negligence of the Pipe Line Company.

On appeal to the Fifth Circuit, Phillips argued that the district court erred in rendering a judgment for Saucedo because, under controlling Texas law, (1) Phillips owed no duty to Saucedo upon which a negligence finding could be predicated, (2) Phillips was not liable to Saucedo because he was injured by the very condition he was hired to repair,

(3) the required showing that Phillips' alleged negligence proximately caused Saucedo's injuries was not made, and (4) Saucedo either assumed the risk of injury or was contributorily negligent.

The Fifth Circuit, however, erroneously rejected the applicable Texas case law, and in so doing created a conflict not only with state law, but within the circuit itself. The panel's decision in this case is either irreconcilable with the previous decisions of other panels, notably *Alexander* v. *United States,* 605 F.2d 828 (5th Cir. 1979) and *Welch* v. *Heat Research Corporation,* 644 F.2d 487 (5th Cir. 1982), or has in effect overruled these decisions in a manner unpermitted by rules of appellate procedure. Furthermore, the Fifth Circuit has refused to address Phillips' main point that it owed no duty to Saucedo because he was injured by the same dangerous condition he was hired to repair.

Phillips brought all of these matters to the attention of the Fifth Circuit in its Petition for Rehearing and Suggestion for Rehearing En Banc, but without success. Phillips now petitions this Court to review the ruling of the Court of Appeals on these issues.

REASON FOR GRANTING THE WRIT

I.

The decisions below conflict with two different rules of Texas law, either of which completely exculpates Phillips. The decisions below ignore the dictates of *Erie Railroad Co. v. Tompkins, supra,* and 28 U.S.C. § 1652.

This is a diversity action arising in Texas and governed by the laws of Texas. In this case, Texas tort law clearly exonerates Phillips in two respects:

1. An injury to a repairman caused by the object he is hired to fix is not a foreseeable injury, and therefore under Texas law no proximate cause exists. *Scurlock Oil Company* v. *Birchfield*, 630 S.W.2d 674 (Tex.Civ.App. — Houston [1st Dist.] 1981, no writ).

2. Phillips owed no duty to Saucedo because Saucedo is a repairman who was injured by the very condition he was hired to fix. *City of Beaumont* v. *Graham*, 441 S.W.2d 829 (Tex. 1969).

In *Scurlock*, the court of civil appeals held that a person or company which negligently creates a dangerous condition is not responsible for the welfare of the very person hired to repair the condition because an injury to a repairman (unlike a member of the general public) is not foreseeable. That court held:

> [T]he appellant would not be held responsible for an injury resulting from a negligent act if the act was so early and remote that it did nothing more than give rise to the occasion by which the injury was made possible ... [citing authority]. *Id.* at 677.

The *Scurlock* court concluded:

> In the case at bar, the *appellant's negligence did nothing more than create the situation by which the injury of the appellee was made possible.* Although the injury would not have occurred except for the oil spillage, it cannot be said that the appellant, *as a person of ordinary intelligence and prudence, should have anticipated that the appellee would sustain an injury by wrenching his back while performing the very job he was employed to do, i.e.,* the placement of sand on the oil spill. (Emphasis added.) *Id.*

The facts in *Scurlock* are exactly the same as those in this case. For instance, in *Scurlock*, the controlling facts were:

Scurlock vs. Birchfield

1. Plaintiff: Injured Repairman (employed by third party)
2. Defendant: Oil Company
3. Condition: Oil Spill
4. Allegation: Created a Dangerous Condition
5. Points on Appeal: a. No Duty
   b. No Proximate Cause
6. RESULT: OIL COMPANY ***WINS*** IN ***STATE*** COURT.

In the present case, the controlling facts are:

Phillips vs. Saucedo

1. Plaintiff: Injured Repairman (employed by third party)
2. Defendant: Oil Company
3. Condition: Gas Leak
4. Allegation: Created a Dangerous Condition
5. Points on Appeal: a. No Duty
   b. No Proximate Cause
6. RESULT: OIL COMPANY ***LOSES*** IN ***FEDERAL*** COURT.

The cases are indistinguishable, yet the Fifth Circuit refused to follow *Scurlock*. *See also City of Bishop* v. *South Texas Elec. Co-op, Inc.*, 577 S.W.2d 331 (Tex.Civ.App.—

Corpus Christi 1979, no writ), which the Fifth Circuit also failed to follow.

This is a blatant refusal to follow the clear dictates of *Erie* and of this Court in *West* v. *A.T.&T. Co.*, 311 U.S. 223 (1940), *Fidelity Union Trust Co.* v. *Field*, 311 U.S. 169 (1940), and *Commissioner* v. *Bosch*, 387 U.S. 456 (1967). This Court explained the law most succinctly in *West* when it held that:

> A state is not without law save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable. State law is to be applied in the federal as well as the state courts and *it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of "general law" and however much the state rule may have departed from prior decisions of the federal courts.* [*citing authority*] *Id.* at 236-37. (Emphasis added.)

The Fifth Circuit generally follows this Court's directive to apply the law of intermediate courts. *See, e.g., Bailey* v. *Southern Pac. Transp. Co.*, 613 F.2d 1385 (5th Cir. 1980) and *Continental Grain Co.* v. *Martin*, 536 F.2d 592 (5th Cir. 1976). Nevertheless its unexplained failure in this case to follow the Texas law as set out in *Scurlock* is error. It is violative of the decisions of this Court, and the dictates of Congress in 28 U.S.C. § 1652.

More fundamentally the Fifth Circuit ignored the dictates of the Supreme Court of Texas with regard to repairmen and the duty that one owes them. The high court of Texas recognized in *City of Beaumont* v. *Graham, supra,* the general rule that one owes no duty (and therefore cannot be held negligent) to a repairman who is injured by the instrumentality he is hired to repair. The Texas Court wrote:

> [T]he owner or occupier is under no duty to protect them [repairmen] against risks arising from or intimately connected with defects of the premises . . . which the contractor has undertaken to repair. *Id.* at 834.

Clearly, in a diversity case such as this one, under *Erie* and 28 U.S.C. § 1652, the Fifth Circuit is required to follow the expressions of the highest court in Texas and it committed error by fashioning its own version of Texas law.

Phillips would have won this case in state court, but lost because the federal courts that have reviewed this case have refused to apply Texas law. The outcome in this case (and other similar ones) are perhaps the single most contributing factor to the overcrowding of the federal docket system in this country today. Why should a plaintiff file his case in a Texas state court and be held to traditional rules of duty, negligence and proximate cause when he can file the same lawsuit in federal court and obtain an entirely new set of substantive laws? This blatant forum-shopping will continue *ad infinitum* unless this Court takes affirmative action to breathe some life into the *Erie* doctrine. The decision below typifies the inconsistent results that are caused in diversity cases by the improper application of *Erie.* This has led to much of the criticism leveled at diversity jurisdiction. *See e.g.,* Kastenmeier and Remington, "Court Reform and Access to Justice: A Legislative Perspective," *Harvard Journal on Legislation,* Vol. 16:2, 301 at

315 (1979). The problem is not unique to this case, but is a substantial and recurring one that this Court should now correct.

II.

The decision below also conflicts with prior decisions of the Fifth Circuit which have followed the laws of Texas. Accordingly this decision has created an intracircuit conflict as well as a conflict with the explicit law of the State of Texas.

The panel's decision is contrary to the Fifth Circuit decisions in *Alexander* v. *United States*, 605 F.2d 828 (5th Cir. 1979), and *Welch* v. *Heat Research Corp.*, 644 F.2d 487 (5th Cir. 1981), in that *Alexander* and *Welch* specifically state (and hold) that an employer of an independent contractor is not responsible to the employee of that contractor where the contractor is in control of the premises and in control of the operations, even if the job is inherently dangerous. This Court has long held that, without authority from the Supreme Court, one panel cannot overrule or conflict with another decision of a panel in the same circuit. *John Hancock Mut. Life Ins. Co.* v. *Bartels*, 308 U.S. 180 (1939) and *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507 (1950). A later panel must give deference to a prior panel and is constrained to follow that panel unless the Circuit *en banc* holds differently. *See Fulford* v. *Klein*, 529 F.2d 377 (5th Cir. 1976) and Fed. R. App. P. 35.

The conflict caused by the decision in this case and *Alexander* and *Welch* is readily apparent. Texas tort law, as the panel itself acknowledged, conforms to the universal rule that "no tort liability attaches unless the defendant owes the injured plaintiff a duty to guard against or prevent the harm encountered," and "under established Texas law, one securing the services of an independent contractor is not liable for injuries sustained by that contractor's suppliers." (App. A, p. A-4.) The panel, however, then went

on to carve out an exception to these rules for this case, supposedly in reliance on *Alexander* v. *United States, supra. Alexander* was quoted by the panel as saying that the general rule of non-liability to employees of independent contractors does not apply when "the work performed under the contract is *inherently dangerous as a result of circumstances brought about by the employer* . . . ." (App. A, p. A-4.) Phillips is not Saucedo's employer, nor did it hire the Pipe Line Company to repair the line. The panel rested its holding that Phillips had a duty, on the above quoted language, which appears on page 834 of the *Alexander* opinion. However, on page 835, the *Alexander* court further stated and held (which the panel in the instant case ignored):

> While Texas permits vicarious liability under the inherently dangerous activity doctrine, *Texas recognizes no affirmative duty running to the employees of an independent contractor performing inherently dangerous work in a case such as this where the independent contractor is in possession and control of the premises on which the work is performed* (Footnote omitted, emphasis added.)

The *Alexander* court thus points out that the "inherently dangerous" concept applied only to vicarious liability. The district court in this case specifically found that Phillips was not vicariously liable (App. C, p. C-8), a finding left undisturbed by the appellate court. Furthermore, the court in *Alexander* held that a person engaging an independent contractor had no duty (and was therefore *not* liable) to the employee of that independent contractor injured while doing an inherently dangerous job (disposing of faulty hand-grenades). Most importantly, the *Alexander* language that the panel quoted in this case does not deal with the facts in this case because even if the condition herein was inherently dangerous, Phillips was *not* in possession and

control of the premises or in control of the manner in which the repair work was performed.

The Fifth Circuit in *Welch* followed *Alexander* and held:

> Texas permits vicarious liability suits against general contractors (or the party for whom the independent contractor is performing the work) under the doctrine of inherently dangerous activity. *Texas recognizes no affirmative duty running to employees of independent contractors performing work in cases where the independent contractor is in possession and control of the manner in which the work is to be performed and the general contractor (or owner) has not prescribed, by designs, specifications, or otherwise the manner in which the work is to be accomplished.* Alexander v. United States, 605 F.2d 828, 835 (5th Cir. 1979), (644 F.2d at 489-90. Emphasis added.)

Both *Alexander* and *Welch* hold as a matter of law that Texas recognizes no duty in cases such as the instant one. The panel in this case effectively overruled both *Alexander* and *Welch* and created its own special interpretation of Texas law. This heretofore unknown interpretation is contrary to both the decisions emanating from Texas state courts and all other relevant Fifth Circuit decisions. The panel erred by overruling the holding espoused in *Alexander* and reconfirmed in *Welch*. This Court in the exercise of its supervisory power should now resolve the intracircuit conflict created by the decision below.

III.

The decision rendered by the Fifth Circuit in the instant case violates the rights granted to Phillips under Article 1, Section 8 ("Commerce Clause") and the Fifth and Fourteenth Amendments to the Constitution of the United States.

Texas statutory law forbids the producer of oil or gas from owning and/or operating, or controlling a trans-

mission pipe line. Tex.Bus.Corp.Act Ann. art. 2.01(B)(3)(b)(1981). Therefore, a shipper of petroleum products such as Phillips *must* hire a common carrier pipe line to carry its product. To hire such a carrier Phillips must agree to follow the tariff approved by the Interstate Commerce Commission and/or the Texas Railroad Commission. 49 U.S.C. § 1 *et seq.* The federal tariff is now administered by the Federal Energy Regulatory Commission. Neither the shipper nor the common carrier can negotiate special terms. All shippers take the tariff as they find it.

Texas law, as previously noted by the Fifth Circuit in *Alexander* and *Welch,* has never held a shipper of gas or other entity similarly situated responsible for premises or instrumentalities it neither owns nor controls. These prior decisions go hand in hand with the Texas law concerning pipe lines. They intertwine to reach the following logical conclusions: (1) an owner or producer of gas may neither own nor operate a transmission pipe line, (2) all contractual relationships with respect to the shipment of gas are non-negotiable, fixed by tariffs, filed with both the state and federal governments, and (3) since a producer of gas may neither own nor operate a transmission pipe line *and* since a producer may not freely negotiate its own terms with respect to the shipment of its product, *Texas courts have not held a shipper liable for the damage its product causes where that product is on the premises of and under the control of another party.* Accordingly, the state of Texas has limited certain kinds of activities that certain kinds of corporations may do, as is the privilege of every state. This, in and of itself, does not violate anyone's rights. But a completely different situation arises when the state or its courts (or in this case the Fifth Circuit) impose liability on a corporation for the results of an activity which by law the corporation is forbidden to control.

The decision by the court below has destroyed the underlying rationale of the Texas corporation law and its balance with Texas tort law. In the process the court has also unconstitutionally deprived Phillips of its property. The court has held Phillips liable for the injuries a man received while working on someone else's pipe line. The man did not work for Phillips, and Phillips as per Texas law had no control over the pipe line or this man's repair of the pipe line.

If Phillips is going to be held liable for someone else's employee working on someone else's pipe line, it ought to be able to own and control that pipe line. If this Court upholds the decision of the Fifth Circuit, it ought to hold Art. 2.01, Tex. Bus. Corp. Act, unconstitutional, because it deprives Phillips of its property without due process of law. If this Court is going to hold Phillips liable for acts concerning the pipe line, and for the condition of the premises on the pipe line, and make Phillips the insurer of the safety of the Pipe Line Company's or any other independent contractor's repairmen working on the pipe line, then surely this Court is at the same time holding that the Texas law banning Phillips' ownership or control of the pipe line is invalid and unconstitutional.

A corporation, although not a citizen, is entitled to equal protection and due process rights guaranteed to all under the Fourteenth Amendment. *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936). To bar Phillips from controlling and/or owning a pipe line by statutory law and then hold it liable, solely by judicial decree, for incidents over which it has no control is a violation of Phillips' right to due process. Phillips has been victimized by a federal court changing Texas law in the "middle of the stream." This change which created liability on the shipper of liquid natural gas after the occurrence in question is both arbitrary and

unreasonable, especially in light of the prior status of Texas law. The Fifth Circuit has created new law in Texas and forced that law and the accompanying liabilities and responsibilities upon Phillips, some eight years after the fact. This is a blatant deviation from *Erie* and has the effect of depriving Phillips of its due process rights.

Furthermore, such a combination of Texas statutory law and the judicial decision in the court below violates the "Commerce Clause." Art I, § 8, cl.3. The Constitution of the United States specifically charges Congress with the duty "[t]o regulate Commerce . . . among the several states. . . ." Although a state may validly regulate the shipment of gas within its borders, it must do so in a way that does not impede the interstate flow of this vital product. As this Court recently stated in *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n.*, ... U.S. ...., 101 S.Ct. 2352, 2362 (1981), the commerce power

> extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. (quoting from *United States* v. *Wright Wood Dairy Co.*, 315 U.S. 110 (1942).)

The extent to which the Commerce Clause has been granted protection from interference by state regulation is shown in the recent statement by this Court in *Kassel* v. *Consolidated Freight Ways Corp. of Del.*, ... U.S. ...., 101 S.Ct. 1309, 1315 (1981):

> It is now well established ... that the Clause itself is "a limitation upon state power even without congressional implementation [quoting from *Hunt* v. *Washington State Apple Advertising Commission*, 432 U.S. 333, 350 (1977)]. The Clause requires that some aspects of trade generally must remain free from interference by

> the states. When a state ventures excessively into the regulation of those aspects of commerce, it "trespasses on national interest," ... [quoting *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366, 373 (1976)].

The transfer of petroleum products is an area of legislation and control which Congress has most extensively undertaken as a matter of federal concern. The Interstate Commerce Commission (and now the Federal Energy Regulatory Commission) has specific control over interstate pipe lines. 49 U.S.C. § 1 *et. seq.* The shippers that use the pipe line must ship their products pursuant to the tariffs approved by these federal agencies. The pipe line owners are completely governed by these agencies. The federal government also controls the safety aspects of the pipe line. *See, e.g.*, Hazardous Liquid Pipeline Safety Act, 49 U.S.C. § 2001 (Supp. 1982).

The law of the State of Texas which prohibits a company from owning a pipe line on the one hand, and then on the other, as a result of the decision below, holds that same company liable as an insurer in the transport of its petroleum products is neither fair nor realistic. Phillips was only one of twenty-three shippers using the pipe line in question at the time of the accident (S.F. 647). Many of them, like Phillips, are extensively engaged in the nationwide production of gas products. Under this decision, each of these shippers (and all other shippers using any pipe line in Texas) can be held liable at any time for any injury occurring when their products are being shipped by pipe line. Texas law does not impose such liability on producers who ship their products other than through pipe lines. In fact, in *Scurlock, supra*, the defendant oil company transporting gas by truck was held not liable for injuries to a clean-up man, even though the oil company was found negligent in causing the oil spill on the public roadway. No sound public policy considerations exist for treating shippers

through pipe lines differently, not under Texas law and certainly not under the Commerce Clause.

The Texas statutory law when combined with this decision by the Fifth Circuit has the effect of superceding federal control, and adding special burdens on every shipper of gas through pipe lines which were neither bargained for nor contained in the tariff approved by the federal and state governments. As a consequence, the decision below places an undue and unconstitutional burden on interstate commerce and raises a serious federal question that should be addressed by this Court.

IV.

The Fifth Circuit erred by not considering certain points on appeal which are dispositive of this case. Phillips has a statutory right to have an appeal and the Fifth Circuit violated Phillips' rights to due process guaranteed by the Fifth and Fourteenth Amendments to the Constitution by failing to consider all points which would control the outcome of the case.

The right of appeal to a United States Circuit Court of Appeals is provided to all parties by 28 U.S.C. § 1292 and Fed.R.App.P. 3 and 4. Implicit in these rules is the guarantee that all parties will have each of their dispositive points of appeal reviewed by an appellate court as a matter of right.

One of Phillips' primary points on appeal was that Saucedo could not recover because he was a repairman injured by the object he was repairing. This point has substantial merit, not only because it is the law in Texas *(see City of Beaumont* v. *Graham, supra,)* but also because *it is the law in every state in the United States. See* 31 A.L.R.2d 1375 (1953 and subsequent supplements).

The Fifth Circuit ignored this point of error and refused to write or even rule on it. Phillips concedes that perhaps a court of appeals is not required to rule on every ground

of appeal, if those grounds are not controlling or immaterial. *Biddy* v. *Diamond*, 516 F.2d 118 (5th Cir. 1975). Similarly, Phillips recognizes that summary decisions or decisions without oral argument have been held not to violate the Constitution. *Groendyke Transport, Inc.* v. *Davis*, 406 F.2d 1158 (5th Cir.) *cert. denied*, 394 U.S. 1012 (1969). But a court cannot constitutionally avoid ruling on a point of error which controls the case. This is a complete denial of any "hearing." If Phillips' contentions with regard to the standards involved with repairmen-plaintiffs are accurate, it wins automatically. This Court has held that one must be given the right to a *meaningful* hearing to satisfy the Constitutional safeguards. *Boddie* v. *Connecticut*, 401 U.S. 371 (1971). An appeal in which the main point is ignored is not meaningful. This issue is completely dispositive of the entire case *and* the Fifth Circuit refused to rule upon it. Even if the Fifth Circuit is absolutely accurate in its opinion as written, Phillips would still win on this issue.

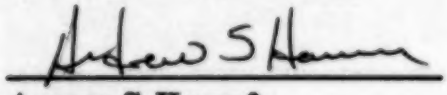
Prior decisions by the Fifth Circuit explain that its "duty is to enunciate the law on the record facts." *Empire Life Insurance Co. of America* v. *Valcek Corp.*, 468 F.2d 330, 334 (5th Cir. 1972). The Circuit violated this duty it owed to Phillips and in doing so violated Phillips' constitutional rights to due process and equal protection guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

This case should be reversed and remanded to the Fifth Circuit with an order that it consider this point of error. Phillips always maintained it was not liable to Saucedo because he was a repairman. This point was presented to the Fifth Circuit and was thoroughly briefed. The Fifth Circuit erred by not considering the universally accepted "repairman exception" to the rule of liability.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,



ANDREW S. HANEN*
FRED KNAPP, JR.
ALFRED H. EBERT, JR.

ANDREWS & KURTH
4200 Texas Commerce Tower
Houston, Texas 77002
(713) 220-4200

EUGENE C. MARSHALL

PHILLIPS PETROLEUM COMPANY
Houston, Texas

KENNETH HEADY
C. J. ROBERTS

PHILLIPS PETROLEUM COMPANY
Bartlesville, Oklahoma

Attorneys for Petitioner, Phillips Petroleum Company

* *Counsel of Record*

APPENDIX A

No. 81-1410

SUMMARY CALENDAR.

United States Court of Appeals,

FIFTH CIRCUIT

MARCH 19, 1982.

EDDIE C. SAUCEDO,

Plaintiff-Appellee,

AND

TEXAS EMPLOYERS' INSURANCE ASSOCIATION,

Intervenor-Appellee,

V.

PHILLIPS PETROLEUM COMPANY,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS.

Before BROWN, POLITZ and WILLIAMS, Circuit Judges.

POLITZ, Circuit Judge:

Eddie C. Saucedo sustained serious burn injuries in a flash fire which occurred while he was working as a welder's helper on a pipeline repair crew. Saucedo was an employee of Phillips Pipe Line Company, owner of the E—Z Pipeline, a ten-inch pipeline which traverses 436 miles between the Texas towns of Benedum and Sweeney. At the time of the accident, the pipeline carried natural gas liquids (NGLs) belonging to the defendant, Phillips Petroleum Company (Phillips), to its refinery in Sweeney. This diversity case

was tried to the bench, resulting in a judgment in favor of Saucedo and the workers' compensation intervenor. Phillips appeals, claiming that the trial judge made erroneous findings of fact and errors in the application of the controlling rules of law. Finding no merit in any assignment, we affirm.

Late in the afternoon of October 17, 1974, a leak developed in the E–Z Pipeline near Eldorado in Schleicker County, Texas. A repair crew, including Saucedo, was dispatched to the situs by Phillips Pipe Line Company. NGLs escaped for several hours. The repair crew began work the next morning, using a backhoe to expose the pipe. As is frequently the case in these spills, the escaping gas froze the earth below the line. While Saucedo was attempting to use a jackhammer to break up the frozen dirt, a flash fire erupted, injuring Saucedo and three other members of the repair crew.

The trial judge found that: (1) NGLs are inherently dangerous substances and the transportation of NGLs is an inherently dangerous undertaking; (2) the E–Z Pipeline was not adequate for the safe transportation of NGLs; and (3) in allowing its NGLs to be transported through the E–Z Pipeline, Phillips was negligent, negligence which was a proximate cause of Saucedo's injuries. Phillips was also found negligent in its management of the pipeline's cathodic protection system.[1]

Findings of fact of the trial judge are protected by the clearly erroneous shield of Fed.R.Civ.P. 52(a). Absent "the

---

[1] Phillips Pipe Line Company was found negligent for: (1) failing to provide its employees with equipment to eliminate gas vapors in the working area; (2) continuing to transport natural gas liquids through the E-Z Pipeline after discovery of the leak; and (3) failing to provide its employees with protective clothing. Under the Texas Workers' Compensation statute, Phillips Pipe Line Company is not liable in tort to Saucedo.

definite and firm conviction that a mistake has been committed," we will not disturb such findings. *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 385, 68 S.Ct. 525, 537, 92 L.Ed. 746 (1948). After reviewing the evidence, we have not formed such a conviction. Accordingly, we focus our attention on appellant's contentions that the district judge erred in applying the applicable rules of Texas tort law. In commencing our examinations, we are mindful of the admonition that in diversity matters great deference is accorded to the explication of state law made by the district judge, schooled and skilled in the law of his state. *Avery* v. *Maremont Corp.*, 628 F.2d 441 (5th Cir. 1980).

Duty As A Requisite

[1] Phillips correctly maintains that no tort liability attaches unless the defendant owes the injured plaintiff a duty to guard against or prevent the harm encountered. In *Abalos* v. *Oil Dev. Co. of Texas*, 544 S.W.2d 627, 631 (Tex. 1976), the Texas Supreme Court noted the universal rule: "As this court said in *Coleman* v. *Hudson Gas and Oil Corporation*, 455 S.W.2d 701 (Tex. 1970), any plaintiff must prove the existence of a legal duty owed to him by the defendant to establish tort liability." The scope or ambit of a defendant's duty is a legal matter, distinct from the factual questions of breach and consequences. *See, e.g., Welch* v. *Heat Research Corp.*, 644 F.2d 487 (5th Cir. 1981); *Gray* v. *Baker & Taylor Drilling Co.*, 602 S.W.2d 64 (Tex. Civ.App. 1980); *Jackson* v. *Associated Developers of Lubbock*, 581 S.W.2d 208 (Tex.Civ.App. 1979); *Frontier Theatres, Inc.* v. *Brown*, 362 S.W.2d 360 (Tex.Civ.App. 1962).

[2] The trial court found that the E–Z Pipeline was not reasonably safe for the transportation of NGLs. The level

of cathodic protection between Mileposts 71 and 82 was inadequate and the external corrosion in that same area had so weakened the line that leaks were foreseeable. Phillips was found negligent for using the weakened pipeline to transport its NGLs. Phillips stands accountable for any foreseeable injury resulting from its failure in this regard.

[3] Phillips contends that it owed no duty to Saucedo because he was an employee of Phillips Pipe Line Company, an independent contractor. This legal argument has merit, for under established Texas law one securing the services of an independent contractor is not liable for injuries sustained by that contractor's employees. *See Allen* v. *Texas Electrical Serv. Co.*, 350 S.W.2d 866 (Tex.Civ.App.1961). *See also Alexander* v. *United States*, 605 F.2d 828 (5th Cir. 1979).

The rule advanced by Phillips is not absolute. There are exceptions, including the lifting of nonliability when "the work performed under the contract *is inherently dangerous as a result of circumstances brought about by the employer* . . . ." *Alexander* v. *United States*, 605 F.2d at 334 (emphasis added) (citation omitted). *See Sun Oil Co.* v. *Kneten*, 164 F.2d 806 (5th Cir. 1948). In view of the trial court's factual findings, concerning Phillips' failure to discharge its safety responsibilities with respect to the E–Z Pipeline and the inherent danger in transporting NGLs through the line as a result, we are persuaded that this exception to the rule applies. Phillips was charged with the duty of choosing a reasonably safe means of transporting its NGLs, and the duty of managing a cathodic protection system, to retard corrosion of the NGLs pipeline. Its failure to acquit these responsibilities resulted in an inherently dangerous situation on October 17, 1974, which culminated in Saucedo's injuries.

Causation

[4] Under dispositive Texas law, proximate cause embraces two concepts: (1) cause in fact; and (2) foreseeability. *See e.g., Farley* v. *M M Cattle Co.*, 529 S.W.2d 751 (Tex. 1975); *Clark* v. *Waggoner*, 452 S.W.2d 437 (Tex. 1970); *Baumler* v. *Hazelwood*, 162 Tex. 361, 347 S.W.2d 560 (1961). "As to causation, it is said that if the defendant's act or omission was a substantial factor in bringing about the result, it will be regarded as a cause, and that ordinarily it will be such a substantial factor if the result would not have occurred without it." *Hopson* v. *Gulf Oil Corp.*, 150 Tex. 1, 237 S.W.2d 352, 355 (1951). *See Missouri Pacific R. R. Co.* v. *American Stateman*, 552 S.W.2d 99 (Tex. 1977). The test for foreseeability is whether the negligent actor should have anticipated the risk to persons, within the range of the actor's duty, growing out of the negligent act or omission. *See e.g., City of Bishop* v. *South Texas Elec. Co-Op., Inc.*, 577 S.W.2d 331 (Tex. Civ. App. 1979).

[5] Phillips offers three causation arguments: (1) any relationship between its alleged negligence and the flash fire of October 18, 1974, is remote and speculative; (2) Saucedo's accident was not foreseeable; and (3) the intervening conduct of Phillips Pipe Line Company severed the causal chain. Of these contentions, only the last bears merit.[2]

---

[2] Phillips Petroleum may not assert successfully that its negligence in the transmission of NGLs through a pipeline it knew or should have known to be unsafe for that purpose was not a cause-in-fact of the leak and the subsequent fire. Both the leak and the fire were foreseeable. It cannot be argued with any force that the appearance of pipeline company repairmen to remedy the leak was unforeseeable. With both the arrival of workers on the scene and the ignition of a fire foreseeable, the simultaneous occurrence of the two is subject to reasonable anticipation.

[6] According to Phillips, when Saucedo's supervisors opted to attempt repairs in the presence of the escaped NGLs, and sought to do so without shutting down the gas flow, any negligence attributable to it in creating the hazard was superseded by Phillips Pipe Line Company's negligence. In support of this contention, Phillips cites *Robertson* v. *Southwestern Bell Telephone Co.*, 403 S.W.2d 459 (Tex. Civ. App. 1966), and *Bell* v. *Campbell*, 434 S.W.2d 117 (Tex. 1968). The essential thrust of those decisions is that negligence which does no more than furnish a condition which renders injury possible is not a proximate cause "if such injury is the result of some other cause which reasonable minds would not have anticipated...." 403 S.W.2d at 473 (citations omitted).

We perceive significant distinction between the mere furnishing of a situs for an accident, which the cited opinions address, and Phillips' creation of an inherently dangerous situation, which we note in the case at bar. The magnitude of potential harm resulting from Phillips' negligence distinguishes the suit from the negligent acts in either *Robertson* or *Bell*. It appears that the ill-conceived and executed actions of Saucedo's supervisors were a concurrent cause of the fire and, consequently, of Saucedo's injuries. The trial court so found. However, we are not prepared to hold that Saucedo's employer's response to the emergency situation, presented by the escaping NGLs, was so grossly inadequate or so aberrant as to constitute action that could not reasonably have been anticipated by Phillips. Their conduct does not absolve Phillips of its delictual responsibilities and liability to Saucedo.

The judgment of the district court is, in all respects, AFFIRMED.

APPENDIX B

United States Court of Appeals,

FOR THE FIFTH CIRCUIT

No. 81-1410

SUMMARY CALENDAR

D. C. DOCKET No. A-76-CA-181

EDDIE C. SAUCEDO,

Plaintiff-Appellee,

AND

TEXAS EMPLOYERS' INSURANCE ASSOCIATION,

Intervenor-Appellee,

VERSUS

PHILLIPS PETROLEUM COMPANY,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

Before BROWN, POLITZ and WILLIAMS,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendant-appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

March 19, 1982

ISSUED AS MANDATE:

APPENDIX C

United States District Court

WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

(FILED JULY 9, 1981)

EDDIE C. SAUCEDO

VS.

PHILLIPS PETROLEUM COMPANY

CIVIL ACTION NO. A-7 -CA-181

MEMORANDUM OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is a suit for personal injury damages filed by Eddie C. Saucedo against Phillips Petroleum Company. Jurisdiction of the Court is based upon 28 U.S.C.A. 1332 and is undisputed.

At all times material herein Eddie C. Saucedo was an employee of the Phillips Pipe Line Company, a separate corporate entity from the defendant Phillips Petroleum Company. However, defendant Phillips Petroleum Company was the sole owner of all issued corporate stock of the Pipe Line Company.

On October 18, 1974, in Schleicher County, Texas, plaintiff and several other employees of the Phillips Pipe Line Co. were engaged in repairing a leak on what was known as the "E-Z" pipeline. This pipeline was owned by plaintiff's employer, Phillips Pipe Line Co., and was carrying natural gas liquids owned by the defendant. While the

repair crew, including the plaintiff, was excavating frozen dirt near the pipeline, the leaking natural gas liquids suddenly ignited. The precise source of the ignition could not be determined but the record shows that there were several possibilities. Four of the crew members were burned and plaintiff received second and third degree burns over sixty-six percent of his body which resulted in severe disfigurement.

Intervenor, Texas Employers Insurance Association, was the worker's compensation carrier for plaintiff's employer and it paid various compensation benefits and all reasonable and necessary medical expenses incurred by plaintiff. The Intervenor's total subrogation interest was stipulated to be $46,626.92.

The "E-Z" pipeline was originally constructed in 1928 by the Shell Oil Corporation. It was more than four hundred miles in length and was used by Shell Oil Corporation for the transportation of crude petroleum. In 1954 the pipeline was purchased by Phillips Pipe Line Company and was used to transport crude petroleum for about one year. In 1955 the Pipe Line Company began using this line for the transportation of natural gas liquids and has continued to do so since that time. The line terminates in Sweeney, Texas, and is a principal source of materials for defendant's refinery in Sweeney, Texas.

The leak history records of the "E-Z" pipeline were maintained by defendant's engineering department and these records show that from 1928 until 1954 there were 499 leaks from various causes and that from 1955 until October 18, 1974, there were 140 additional leaks from various different causes. While these 639 leaks were caused by a variety of circumstances (some even by third parties) external corrosion was one of the principal causes. The

record also shows that the leak being repaired at the time of plaintiff's injury was caused by external corrosion.

It is undisputed that natural gas liquids are highly volatile because they are liquid only while under pressure greater than atmospheric pressure. When released into the atmosphere at normal temperatures, these liquids vaporize and little can be done to contain, dispose of, or dissipate the flammable mixture which results. More important, when a leak of natural gas liquids occurs in a pipeline such as the "E-Z" line, the escaping gases freeze the ground around the pipe so that the dirt and material surrounding the leak has to be broken out with some type of equipment.

It is also undisputed that because of the age and nature of the "E-Z" pipeline, the line could not be used for the transportation of natural gas liquids without an adequate cathodic protection system. Although the pipeline was owned by Phillips Pipe Line Company, the defendant's engineers were in total control of the management of the cathodic protection system. The Pipe Line Company employed defendant's engineers for that specific purpose.

The record reveals that on February 22, 1973, in Travis County, Texas, a leak developed on the "E-Z" pipeline which at that point was located near a county road. When a stalled motorist attempted to start his vehicle, the gases created by the leak ignited. Six people were killed and two more were severely burned in the resulting fire. Because of this tragedy an investigation was made by the National Transportation Safety Board. One of the conclusions made by the N.T.S.B. after making a study of the "E-Z" line was as follows: "The Phillips Pipe Line Company's 10-inch pipeline from Benedum to Sweeney, Texas, was not structurally adequate for the transportation of

natural gas liquids." Both the defendant and the Pipe Line Company were aware of this N.T.S.B. finding shortly after it was made on November 7, 1973.

At all times material herein the natural gas liquids being transported through the "E-Z" pipeline was owned by the defendant and the record clearly shows that natural gas liquids constitute an inherently dangerous substance.

It is plaintiff's contention that defendant was negligent in permitting its natural gas liquids to be transported through a pipeline which defendant's engineers knew, or, by the exercise of ordinary care, should have known was structurally inadequate for the transportation of natural gas liquids and that such negligence was a proximate cause of plaintiff's injuries and damages. In addition, plaintiff contends that defendant's engineers were negligent in their management of the cathodic protection system for the "E-Z" pipeline and that such negligence was a proximate cause of plaintiff's injuries and damages. Plaintiff further contends that his employer, Phillips Pipe Line Company, was negligent (a) by continuing to use the "E-Z" pipeline to transport natural gas liquids when it knew, or, by the exercise of ordinary care, should have known that it was structurally inadequate for the transportation of natural gas liquids and (b) by failing to provide adequate safety equipment for use during the repair of the leak on October 18, 1974 and that said negligence was a proximate cause of plaintiff's injuries and damages. Plaintiff contends that the Pipe Line Company's negligence is imputed to the defendant because defendant is the owner of an inherently dangerous substance and that the duty of the defendant to exercise a high degree of care to see that such material is transported safely is non-delegable.

It is defendant's contention that it owes no legal duty to plaintiff because plaintiff is an employee of the Pipe Line

Company which defendant contends is acting as an independent contractor in transporting defendant's natural gas liquids. The defendant further contends that it was not negligent by continuing to permit its natural gas liquids to be transported by the "E-Z" pipeline because the pipeline was structurally adequate and its leak record was acceptable. Defendant also contends that its engineers were not negligent in their management of the cathodic protection program for the "E-Z" pipeline and that the cathodic protection was adequate. Defendant further contends that plaintiff was negligent on the occasion in question in the following respects and that each act of negligence was a proximate cause of his injuries: (a) in working in an excavation in which natural gas liquids and vapor were present; (b) in working in that excavation when no ventilation equipment was in operation; (c) in failing to wear fire protective or resistant clothing; (d) in using the mechanically powered jackhammer in that environment; and (e) in the manner in which he used the jackhammer.

Based upon the record herein established, the Court enters the following Findings of Fact and Conclusions of Law:

A. FINDINGS OF FACT

1. Natural gas liquids such as those being transported by the "E-Z" pipeline constitute an inherently dangerous substance and the transportation of such material constitutes an inherently dangerous undertaking.

2. Prior to and on October 18, 1974, the "E-Z'" pipeline was not structurally adequate for the reasonably safe transportation of natural gas liquids.

3. Prior to and on October 18, 1974, the defendant knew or in the exercise of ordinary care should have known that:

(a) the "E-Z" pipeline was not structurally adequate for the reasonably safe transportation of natural gas liquids;

(b) the "E-Z" pipeline had not received adequate cathodic protection between Mileposts 71 and 82;

(c) accelerated external corrosion had weakened the pipeline between Mileposts 71 and 82 to the extent that leaks in that area were foreseeable.

4. Prior to and on October 18, 1974, the defendant was negligent in the following respects:

(a) in permitting its natural gas liquids to be transported through the "E-Z" line.

(b) in its management of the cathodic protection system between Mileposts 71 and 82 of the "E-Z" line.

5. Each of the foregoing negligent acts and omissions of the defendant was a proximate cause of plaintiff's injuries and damages.

6. Prior to and on October 18, 1974, the Phillips Pipe Line Company was negligent in the following respects:

(a) in continuing to transport natural gas liquids through the "E-Z" pipeline.

(b) in failing to provide its employees with equipment to eliminate some of the gas vapors in the working area.

(c) in failing to provide its employees, including plaintiff, with protective clothing.

7. Each of the foregoing negligent acts and omissions of the Phillips Pipe Line Company was a proximate cause of plaintiff's injuries and damages.

8. The Phillips Pipe Line Company was not an independent contractor of defendant Phillips Petroleum Company with respect to the "E-Z" pipeline.

9. Plaintiff was not negligent in any respect.

10. The air hammer being used by plaintiff and his coworkers did not at any time come in contact with the pipeline.

11. As a direct and proximate result of the injuries he received, plaintiff has sustained the following damages:

(a) Past medical expenses incurred which were necessary and reasonable in amount — $28,536.72.

(b) Loss of earnings sustained from date of injury up to the time of trial — $60,856.71.

(c) Loss of capacity to work and earn money which in reasonable probability he will incur in the future — $200,000.00.

(d) Physical pain and mental anguish which he has sustained in the past and which in reasonable probability he will sustain in the future — $50,000.00.

(e) Physical disfigurement sustained in the past and which in reasonable probability he will sustain in the future — $225,000.00.

(f) Physical impairment sustained in the past and which in reasonable probability he will sustain in the future which interferes with his ability to engage in normal recreational and family activities — $150,000.00.

B. CONCLUSIONS OF LAW

1. Plaintiff, Eddie C. Saucedo, is entitled to recover judgment against defendant, Phillips Petroleum Company, based upon the negligence stated in FINDINGS OF FACT

No. 4(a) and (b), each of which acts of negligence was a proximate cause of his injuries and damages.

2. Defendant, Phillips Petroleum Company, is not vicariously liable to plaintiff for the negligence of Phillips Pipe Line Company.

3. Defendant, Phillips Petroleum Company is not entitled to offset the damages awarded herein to plaintiff by reason of the negligence of Phillips Pipe Line Company.

4. Intervenor, Texas Employers Insurance Association, is entitled to receive its subrogation interest in the amount of $46,626.92 from the damages awarded herein to plaintiff.

5. Plaintiff, Eddie C. Saucedo, is entitled to recover of and from defendant, Phillips Petroleum Company, the sum of $714,393.43.

6. The Clerk of the Court is hereby ordered to enter judgment accordingly, assessing all costs against defendant.

ENTERED on this 9th day of July, 1981.

JACK ROBERTS
JACK ROBERTS
Senior United States District Judge

JUDGMENT ON DECISION BY THE COURT

United States District Court

FOR THE
WESTERN DISTRICT OF TEXAS — AUSTIN DIVISION

CIVIL ACTION FILE NO. A-76-CA-181

EDDIE C. SAUCEDA (sic)
vs.
PHILLIPS PETROLEUM COMPANY

JUDGMENT

This action came on for trial before the Court, Honorable Jack Roberts, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that Plaintiff, Eddie C. Sauceda (sic) recover of the Defendant, Phillips Petroleum Company, the sum of $714,393.43 and costs of court and that Intervenor, Texas Employers Insurance Association, is entitled to receive its subrogation interest in the amount of $46,626.92 from the damages awarded herein to Plaintiff, Eddie C. Sauceda (sic).

Dated at Austin, Texas, this 9th day of July, 1981.

CHARLES W. VAGNER
Clerk of Court

C. M. SAUNDERS
BY: C. M. SAUNDERS, *Deputy*

APPENDIX D

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 81-1410

(FILED MAY 19, 1982)

EDDIE C. SAUCEDO,

Plaintiff-Appellee,

AND

TEXAS EMPLOYERS' INSURANCE ASSOCIATION,

Intervenor-Appellee,

VERSUS

PHILLIPS PETROLEUM COMPANY,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion March 19, 1982, 5 Cir., 198., ...F.2d....).

(MAY 19 1982)

Before BROWN, POLITZ and WILLIAMS, Circuit Judges.

PER CURIAM:

(V) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate

Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ .....
United States Circuit Judge

CLERK'S NOTE:
SEE RULE 41 FRAP
AND LOCAL RULE 17
FOR STAY OF THE
MANDATE

APPENDIX E

Texas Revised Civil Statute Annotated article 8303, Section 3:

> The employees of a subscriber and the parents of minor employees shall have no right of action against their employer or against any agent, servant or employee of said employer for damages for personal injuries, and the representatives and beneficiaries of deceased employees shall have no right of action against such subscribing employer or his agent, servant or employee for damages for injuries resulting in death, but such employees and their representatives and beneficiaries shall look for compensation solely to the association, as the same is hereinafter provided for. All compensation allowed under the succeeding sections herein shall be exempt from garnishment, attachment, judgment and all other suits or claims, and no such right of action and no such compensation and no part thereof or of either shall be assignable, except as otherwise herein provided, and any attempt to assign the same shall be void. If any action for damages on account of injury to or death of an employee of a subscriber is brought by such employee, or by the representatives or beneficiaries of such deceased employee, or by the association for the joint use and benefit of itself and such employee or such representatives or beneficiaries, against a person other than the subscriber, as provided in Section 6a, Article 8307, Revised Civil Statutes of Texas, 1925, and if such action results in a judgment against such other person, or results in a settlement by such other person, the subscriber, his agent, servant or employee, shall have no liability to reimburse or hold such other person harmless on such judgment or settlement, nor shall the subscriber, his

agent, servant or employee, have any tort or contract liability for damages to such other person because of such judgment or settlement, in the absence of a written agreement expressly assuming such liability, executed by the subscriber prior to such injury or death. No part of this Section is intended to lessen or alter the employees existing rights or cause of action either against his employer, its subscriber, or any third party.

The association, its agent, servant or employee, shall have no liability with respect to any accident based on the allegation that such accident was caused or could have been prevented by a program, inspection, or other activity or service undertaken by the association for the prevention of accidents in connection with operations of its subscriber; provided, however, this immunity shall not affect the liability of the association for compensation or as otherwise provided in this law. No part of this Section is intended to lessen or alter the employees existing rights or cause of action either against his employer, its subscriber, or any third party.